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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

GARY RUTHERFORD,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0707-CR-411
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-0701-FC-5691

May 28, 2008

SHARPNACK, Judge

Gary Rutherford appeals his sentence for operating a motor vehicle while privileges are forfeited for life as a class C felony,¹ operating a vehicle while intoxicated as a class D felony,² and operating a vehicle with BAC greater than .08 as a class D felony.³ Rutherford raises one issue, which we restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm in part and remand in part.

The relevant facts follow. On the evening of January 11, 2007, Indianapolis Police Department Officer Tammy Peters was driving a patrol vehicle northbound on Shadeland Avenue when she observed a truck in the distance lying in a ditch on the right side of the road, yet facing southbound. As Officer Peters activated her emergency lights and approached the truck, she observed that Rutherford was driving it “forward and backward like an attempt to get out of the ditch.” Transcript at 19. Upon exiting the vehicle, Rutherford exhibited several signs of intoxication, including “[r]ed bloodshot, glassy eyes, slurred speech, unsteady balance,” and “the odor of alcoholic beverages.” Id. at 38. His blood alcohol content was determined to be .16%.

The State charged Rutherford with: (1) Count I, operating a motor vehicle while privileges are forfeited for life as a class C felony; (2) Count II, operating a vehicle while intoxicated as a class A misdemeanor; (3) Count III, operating a vehicle with BAC greater than .15 as a class A misdemeanor; (4) Count IV, an enhancement of Count II,

¹ Ind. Code § 9-30-10-17 (2004).

² Ind. Code § 9-30-5-2, -3 (2004).

³ Ind. Code § 9-30-5-1, -3 (2004).

operating a vehicle while intoxicated as a class D felony for previous operating while intoxicated conviction; and (5) Count V, an enhancement of Count III, operating a vehicle with BAC of .08 or more as a class D felony for previous operating while intoxicated conviction. The State also filed an habitual substance offender enhancement.⁴

After a bench trial, the trial court found Rutherford guilty of operating a motor vehicle while privileges are forfeited for life as a class C felony, operating a vehicle while intoxicated as a class A misdemeanor, and operating a vehicle with BAC greater than .15 as a class A misdemeanor. Rutherford admitted that he had previously been convicted of operating while intoxicated, and the trial court entered judgments of conviction for operating a motor vehicle while privileges are forfeited for life as a class C felony, operating a vehicle while intoxicated as a class D felony for previous operating while intoxicated conviction, and operating a vehicle with BAC of .08 or more as a class D felony for previous operating while intoxicated conviction. The court dismissed the habitual substance offender enhancement.

At the sentencing hearing, Rutherford asked the court to consider the following mitigators: (1) imprisonment would result in hardship on his dependents; (2) he suffers from a back injury; and (3) he has ambitions to earn a bachelor's degree. The trial court found the hardship on Rutherford's dependents to be a mitigating factor and found Rutherford's criminal history to be an aggravating factor. Finding that the aggravator outweighed the mitigator, the court sentenced Rutherford to five years for operating a

⁴ Ind. Code § 35-50-2-10 (Supp. 2006).

motor vehicle while privileges are forfeited for life as a class C felony, two years for operating a vehicle while intoxicated as a class D felony for previous operating while intoxicated conviction, and two years for operating a vehicle with BAC of .08 or more as a class D felony for previous operating while intoxicated conviction, all to be served concurrently. Thus, Rutherford received a total sentence of five years in the Indiana Department of Correction.

The sole issue is whether Rutherford's sentence is inappropriate in light of the nature of the offense and the character of the offender. Rutherford argues that his sentence is inappropriate "insofar as the record reflects that he is struggling with a work-related back injury that has had a profound effect on his quality of life, his ability to function, and his emotional welfare." Appellant's Brief at 8.

Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Rutherford was driving a truck in a ditch on the wrong side of the road. He exhibited several signs of intoxication, including "[r]ed bloodshot, glassy eyes, slurred speech, unsteady balance," as well as "the odor of alcoholic beverages," and his blood alcohol content was determined to be .16%. Transcript at 38.

Our review of the character of the offender reveals that Rutherford has four prior felony convictions, including two convictions for operating while intoxicated as class D felonies and two convictions for operating after being adjudged an habitual traffic offender as class D felonies. In addition to executed sentences of six months and 180 days, Rutherford has been on probation three times, and his probation has been revoked three times. Rutherford's criminal history reveals a pattern of alcohol abuse and the endangerment of others that his numerous convictions and attempts at rehabilitation have failed to reverse.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Gillem v. State, 829 N.E.2d 598, 607 (Ind. Ct. App. 2005) (holding that defendant's sentence for two counts of causing death when operating a motor vehicle with a blood alcohol content of .08 or higher and one count of causing serious bodily injury when operating a motor vehicle with a blood alcohol content of .08 or greater was not inappropriate), trans. denied.

The State points out that Rutherford was convicted of both operating a vehicle while intoxicated and operating a vehicle with BAC greater than .08 as class D felonies. The Indiana Supreme Court has held that conviction and punishment for a crime that consists of the very same act as another crime for which the defendant has been convicted and punished violate Indiana's double jeopardy clause. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring)). "An example of this situation is Jones v. State, 523 N.E.2d

750, 754 (Ind. 1988) (vacating a battery conviction because the information showed that the identical touching was the basis of a second battery conviction).” Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring).

Here, both D felony counts arise from the same act, namely, that Rutherford was operating a vehicle while intoxicated. Because the same behavior formed the basis for conviction and punishment for operating a vehicle while intoxicated and operating a vehicle with BAC greater than .08 as class D felonies, we conclude, and the State agrees, that the entry of judgments of conviction on both counts violates the prohibition against double jeopardy, and we remand with instructions to vacate the conviction for operating a vehicle with BAC greater than .08 as a class D felony. See, e.g., Lawson v. State, 803 N.E.2d 237, 243 (Ind. Ct. App. 2004) (holding that defendant’s convictions for illegal possession of alcohol and illegal consumption of alcohol based on the same behavior violated double jeopardy principles), trans. denied.

For the foregoing reasons, we affirm Rutherford’s sentence for operating a motor vehicle while privileges are forfeited for life as a class C felony and operating a vehicle while intoxicated as a class D felony, and we remand with instructions to vacate Rutherford’s conviction for operating a vehicle with BAC greater than .08 as a class D felony.

Affirmed in part and remanded in part.

NAJAM, J. and DARDEN, J. concur